

CANADA / JUDGMENT

Qaddoura v. Lumina Developments Ltd.

2020 BCSC 1504

COURT

Supreme Court of British Columbia

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2020 BCSC 1504 Qaddoura v. Lumina Developments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Qaddoura v. Lumina Developments Ltd.,

2020 BCSC 1504

Date: 20201008

Docket: S198426

Registry: Vancouver

Between:

Amin Fuad Qaddoura

Plaintiff

And

Lumina Developments Ltd.

Defendant

Before: The Honourable Lindsay M. Lyster

Reasons for Judgment

(via teleconference)

Counsel for the Plaintiff:

C. Kooner

Counsel for the Defendant:

D.F. Hepburn

Place and Date of Hearing:

Vancouver, B.C.

August 18, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 8, 2020

Table of Contents

Background.. 3

Procedural History. 4

Analysis. 6

Supplementary correspondence from counsel 7

Should the CPL be cancelled under s. 215 of the LTA?. 7

Should the impugned paragraphs of the relief sought be struck out as disclosing no reasonable cause of action or dismissed as raising no triable issue?. 9

Should the CPL be cancelled under ss. 256 and 257 of the LTA?. 11

Conclusion.. 17

[1] The Defendant, Lumina Development Ltd. ("Lumina"), applies for orders striking out or dismissing certain parts of the notice of civil claim, and for the discharge of a Certificate Of Pending Litigation ("CPL") against the property in issue. The Plaintiff, Mr. Amin Fuad Qaddoura ("Mr. Qaddoura"), opposes all orders sought.

Background

[2] Much of the factual background to this application is not in dispute. The property in question is located at 16022 103 Avenue, Surrey, British Columbia, legally described as:

WEST 297.4 FEET LOT 28 EXCEPT: PART HIGHWAY ON PLAN 28411; SECTION 26 BLOCK 5
NORTH RANGE 1 WEST NEW WESTMINSTER DISTRICT PLAN 1670

PID: 012-290-513

- [3] I will refer to the property as a whole as the Property. Lumina purchased an undivided 75/100 interest in the Property from its original owners, Pervaiz Ahmed and Raana Pervaiz, and subsequently sold an undivided 50/100 interest in the Property, leaving it with a 25/100 undivided interest. In early 2018, Lumina offered to sell a 50% ownership stake in the remaining 25/100 undivided interest to Mr. Qaddoura. There seems to be no real dispute that the Property was purchased by Lumina for the purpose of subdividing it. The 25/100 undivided interest was described as "Lot 4", as it was intended it would be known once the Property was sub-divided. I will refer to this 25/100 undivided interest as the Lands.
- [4] On March 8, 2018, Mr. Qaddoura paid \$10,000.00 as a deposit for a half interest in the Lands. Lumina and Mr. Qaddoura entered into two contracts of purchase and sale related to the Lands on June 25, 2018. Both are on standard forms for real estate conveyances. The rights and obligations created by those contracts are at the heart of this dispute. On their face, they provide as follows.
- [5] The first contract, dated June 25, 2018, provides that Lumina will sell "Half of Lot No. 4" to Mr. Qaddoura "non-serviced" for a price of \$410,000.00 (the "First Contract"). The completion date is June 26, 2018. It states that "no possession is required". Mr. Qaddoura paid the remaining \$400,000.00 of the purchase price to Lumina's solicitors on June 26, 2018.
- [6] The second contract, also dated June 25, 2018, provides that Mr. Qaddoura will sell "Half of Lot No. 4" to Lumina "non-serviced" for a price of \$460,000.00 (the "Second Contract"). Under the heading "Terms and Conditions", the following is written: "Lumina Development is buying back half of Lot No. 4 of 16022 103 Ave as is non serviced from Amin Qaddoura." The completion date is stated to be December 31, 2018. Once again, "no possession required".
- [7] There is no dispute that Lumina did not pay Mr. Qaddoura the \$460,000.00 owing under the Second Contract on or before December 31, 2018. There were email communications between the parties about that fact in early 2019, in which Lumina, through its principal Mr. Salman Mohammed Haleem, acknowledges that \$460,000.00 was due on December 31, 2018, and was not paid, and seeks to negotiate some kind of alternative arrangement.

Procedural History

- [8] Mr. Qaddoura filed his original notice of civil claim on July 26, 2019 (the "Original NOCC"). Paragraph 9 of the Original NOCC reads:

Together, the two contracts effectively constituted a loan agreement where Amin was the creditor and Lumina was the debtor. Lumina agreed to repay Amin the \$410,000 loan principal plus the \$50,000 increase in the purchase price by December 31, 2018.

- [9] Mr. Qaddoura alleges in the Original NOCC that Lumina breached the Second Contract by failing to pay the purchase price by the December 31, 2018 completion date, or in the alternative breached the Second Contract by failing to repay the loan principal plus the \$50,000.00 increase by that same date.
- [10] Mr. Qaddoura sought specific performance of the Second Contract, damages for breach of that contract, a declaration that Lumina holds an interest in the Property for Mr. Qaddoura by way of a resulting or constructive trust, or in the alternative that Mr. Qaddoura be registered on title as an owner of an undivided interest in the Property. Finally, he sought an order that a CPL be registered against the Property. The legal basis in the Original NOCC included that Mr. Qaddoura was entitled to contractual damages or equitable relief by way of specific performance of the Second Contract, and that Mr. Qaddoura contributed to the purchase price and he has a beneficial interest in the Property, held by Lumina in trust.
- [11] The CPL was duly filed on July 30, 2019 under registration number CA7654590.
- [12] Lumina filed its response to civil claim on September 10, 2019. Lumina affirmed that it entered into the First Contract with Mr. Qaddoura. It also accepts that the Second Contract was entered into, but it characterizes it differently. Lumina pleads in para. 5 of its version of the facts that:

Around June 25, 2018, Lumina and Amin agreed that, upon the subdivision of the Lands and creation of a registrable interest in Lot 4, Lumina would pay Amin the sum of \$460,000 in lieu of the transfer of any legal or beneficial interest therein.

- [13] Lumina denies that Mr. Qaddoura paid the amounts owing under the First Contract for the purposes of acquiring any interest in the Property. It says that the funds were paid in consideration of the acquisition of a future interest in Lot 4 following the completion of the subdivision. The Property has not been subdivided. Lumina says, and this position is at the heart of the dispute between the parties, that "the subdivision of the Lands and the creation of a registrable interest in Lot 4 is a condition precedent to the performance of the Agreement". It is therefore Lumina's position that it is not in breach of the Second Contract.
- [14] Lumina says that Mr. Qaddoura has failed to plead any interest in the Property that would support the filing and maintenance of the CPL. Further, the CPL will prevent the filing and registration of the subdivision plan.
- [15] Lumina filed the present application by way of notice of application on July 15, 2020. In it, Lumina seeks an order that paras. 2-4 in Part 2 of the Original NOCC be struck pursuant to Rule 9-5 as disclosing no reasonable cause of action. Those are the paragraphs in which Mr. Qaddoura seeks a declaration of resulting or constructive trust or that he be registered on title as an owner of an undivided interest in the Property. In the alternative, it asks that those paragraphs be dismissed pursuant to Rule 9-6 as raising no bona fide triable issue. Lumina also asks that the CPL be discharged pursuant to s. 215 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], or in the alternative that it be discharged under ss. 252, 254, 256 and 257.

[16] A complicating factor in this application is that Mr. Qaddoura filed an amended notice of civil claim (the "Amended NOCC") in apparent response to the application. In the Amended NOCC, Mr. Qaddoura added paragraphs in respect of the First Contract, pleading that Lumina failed to register him as an owner of an undivided interest in the Property pursuant to the First Contract and that Lumina breached and repudiated that contract. Paragraph 9 of the Original NOCC, which characterized the two contracts as essentially a loan agreement, which I quoted above at paragraph 8, was deleted. In respect of the Second Contract, Mr. Qaddoura deleted the paragraph in which he had pleaded in the Original NOCC in the alternative that Lumina breached the Second Contract by failing to repay the loan. He added paragraphs pleading that he has been and continues to be ready, willing and able to complete the purchase and sale of the Lands pursuant to both contracts, and that he entered into the First Contract with the intention of purchasing the Lands. In terms of relief sought, Mr. Qaddoura added that he sought specific performance of both contracts, and in the alternative seeks equitable damages in lieu of specific performance of both contracts. Finally, he added claims for beneficial and equitable interests in the Lands.

Analysis

- [17] As a preliminary matter, I note that in submissions before me, counsel for Lumina argued that the Amended NOCC is an abuse of process, and should not be considered. Alternatively, he submitted that those portions of it which seek an interest in land or try to enforce both contracts should be struck out.
- [18] I see no basis upon which the Amended NOCC could be held to be an abuse of process. Lumina was not prejudiced by it in pursuing its application. As will become evident in the analysis below, the Amended NOCC is relevant to some but not all parts of the application.

Supplementary correspondence from counsel

- [19] On October 2, 2020, counsel for Lumina wrote the Registry, asking for a letter to be brought to my attention. In it, he indicated that the owners of the Property, including Lumina, are continuing to incur significant financing costs and need to obtain further financing to pay for project related costs. I advised the Registry I would review the letter and asked the Registry to provide counsel for Mr. Qaddoura with an opportunity to respond.
- [20] On October 5, 2020, counsel for Mr. Qaddoura wrote in reply. He submitted that that Lumina's letter was highly inappropriate for a number of reasons, including being contrary to Practice Direction PD-27. In this regard, he states that opposing counsel failed to consult with him prior to writing to the court, and that despite it indicating that he was copied on the letter, he only received a copy when he requested one from the Registry. If that is what occurred, that is contrary to Practice Direction PD-27, which directs counsel or parties to consult with one another prior to writing to the court.

[21] It is not clear to me what the intended purpose of the letter was. If the information about financing costs was intended to be additional evidence to be taken into account by the court, an application was necessary. If it was intended to somehow prod the court into issuing its decision, it was inappropriate.

[22] I have not taken the contents of the letter into account in coming to my decision in this matter.

Should the CPL be cancelled under s. 215 of the LTA?

[23] Lumina argues that the Original NOCC fails to advance a proprietary interest in the Lands, with the result that the CPL must be cancelled under s. 215 of the LTA.

[24] Section 215(1) of the LTA provides in relevant part:

215 (1) A person who has commenced or is a party to a proceeding, and who is

(a) claiming an estate or interest in land, or

(b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land in the same manner as a charge is registered

[25] The decision of the Court of Appeal in *Bilin v. Sidhu*, 2017 BCCA 429, makes clear that "the existence of a validly registered CPL, as demonstrated by pleadings that support an interest in land, must be a threshold criterion for its continued registration. In other words, CPLs that fail to meet the 'pre-condition' set out in s. 215(1) may be cancelled for that reason": at para. 55. See also *Berthin v. Berthin*, 2018 BCCA 57, at para. 40.

[26] In *Bilin*, as here, an amended notice of civil claim had been filed shortly before the hearing at which the court considered the validity of the CPL. The Court of Appeal held that the analysis of whether the pleadings support an interest in land was to be undertaken on the basis of the pleadings filed in support of the CPL, and not the pleadings as they might subsequently be amended: para. 62. I will therefore consider the question of whether the CPL should be cancelled under s. 215 on the basis of the Original NOCC.

[27] Relying on para. 9 of the Original NOCC, wherein Mr. Qaddoura pleaded that "the two contracts effectively constituted a loan agreement wherein Qaddoura was the creditor and Lumina was the debtor", Lumina argues that it is plain and obvious that Mr. Qaddoura has failed to advance a proprietary interest in the Lands.

[28] I do not agree. If the Original NOCC is reviewed in its entirety, it is apparent that an interest in the Lands is advanced. It is pleaded that Lumina offered Mr. Qaddoura a 50% ownership interest in the 25/100 undivided interest in the Property and that the parties entered into the two contracts already described for their purchase and sale. Under the First Contract, Mr. Qaddoura agreed to buy the 50% ownership interest. The fact that under the Second Contract Lumina was to buy that interest back does not negate the fact that the First

Contract was a contract for the purchase and sale of an ownership interest in the Lands. This stands in distinction to the facts in *Bilin*, in which the chambers judge, upheld on this point by the Court of Appeal, held that the relationship between the parties created by a promissory note and the advance of fund was one of debtor and creditor, with no enforceable condition related to land or security of land: see paras. 30 and 63.

- [29] I conclude that the Original NOCC claimed an interest in land, with the result that the necessary precondition for the CPL being validly filed under s. 215(1) is met. I therefore decline to cancel the registration of the CPL under s. 215.

Should the impugned paragraphs of the relief sought be struck out as disclosing no reasonable cause of action or dismissed as raising no triable issue?

- [30] In the alternative, Lumina seeks to have paras. 2-4 of the Original NOCC either struck as disclosing no reasonable cause of action or an abuse of process, or dismissed as raising no triable issue. These paragraphs remain unaltered in the Amended NOCC, albeit renumbered as paras. 4-6. In these paragraphs, Mr. Qaddoura seeks a declaration that Lumina holds an interest in the Lands for him by way of a resulting or constructive trust; in the alternative, that he be registered on title as an owner of an undivided interest; and for the registration of the CPL.
- [31] In *Bilin*, the Court of Appeal discussed the situation where the pleadings raise no triable issue to support a claim for an interest in land, saying that "the proper approach in this situation is to bring an application under Rule 9-6(4) for the summary dismissal of the part of the claim that relates to land. If that application succeeds, the successful party may apply to cancel the CPL in conformity with the procedure set out in s. 254 of the Land Title Act."
- [32] Rule 9-5(1) states that the court may strike out any pleading on the ground that it does not disclose a cause of action or legally sustainable claim or is otherwise an abuse of process. The test to be applied is that, assuming the facts as stated or amended to be true, do those facts disclose no cause of action, the pleadings disclose no arguable issue, and is it plain and obvious that the claim cannot succeed? If there is a chance that the action may succeed, it should be allowed to proceed: *Gateway Building Management Limited v. Manjit Singh Randhawa*, 2013 BCSC 350 at paras. 15-17.
- [33] Rule 9-6(4) provides that the court must dismiss a claim if it is satisfied that there is no bona fide issue for trial. To succeed under Rule 9-6, the applicant must establish that it is manifestly clear that no bona fide issue exists, with any doubt being resolved in favour of the plaintiff. In considering an application under Rule 9-6, the court may consider evidence, but it is generally not appropriate to assess credibility and weigh evidence: *Jesson v. Wilkinson*, 2018 BCSC 1921, paras. 16-18.
- [34] In my view, assuming the facts alleged in them to be true, both the Original and the Amended NOCC disclose a cause of action, and it is not plain and obvious that the cause of action cannot succeed. As I have already explained, Mr. Qaddoura alleges in the Original

NOCC that he agreed to buy a 50% ownership interest in the 25/100 undivided interest in the Lands from Lumina in the First Contract, and that Lumina further agreed in the Second Contract to buy back that interest on December 31, 2018, for \$50,000 more than he paid for it. It is not in dispute that the Second Contract has yet been completed as Lumina has not yet bought back the interest in the Lands. Those facts, if proven, may be sufficient to persuade a court to declare that Lumina holds an interest in the Lands for Mr. Qaddoura by way of a resulting or constructive trust or for an order that Mr. Qaddoura be registered on title as an owner of an undivided interest in the Lands. For the reasons I have already given in considering the application under s. 215 of the LTA, the facts as alleged disclose a proprietary interest in the Lands, justifying the registration of the CPL.

- [35] Lumina also asserted in its application that the pleadings constitute an abuse of process, but no independent argument was made in support of this proposition and I reject it.
- [36] For those reasons, I deny the application to strike the impugned paragraphs under Rule 9-5(1).
- [37] Nor has Lumina established that the claims should be dismissed under Rule 9-6(4). In considering this part of the application, I may consider evidence. The two contracts indicate on their face that they were contracts for the purchase and sale of the Lands, and contemplate that the purchaser will be registered on title at the Land Title Office, something that did not occur after the First Contract. This provides a basis upon which Mr. Qaddoura's alternative claim that he be registered on title as an owner of an undivided interest in the Lands could succeed.
- [38] In oral submissions, counsel for Lumina argued, in relation to the Amended NOCC in particular, that both contracts could not be valid, and that it was inconsistent for Mr. Qaddoura to somehow rely on both contracts. It is not clear and obvious to me that both contracts could not be valid or that it is not open to Mr. Qaddoura to rely on them both. Clearly, the parties entered into the two contracts, and they did so with the intention that they would, together, govern their legal rights and obligations in relation the Lands. Viva voce evidence may well be required in order to interpret how the two contracts are to work together. Any questions regarding the interpretation and application of the two contracts, including whether Mr. Qaddoura is entitled to specific performance of one or both of the contracts, can only be addressed at trial.
- [39] It is certainly not clear that no bona fide triable issue exists, and thus Lumina's application under Rule 9-6(4) cannot succeed, regardless of whether one considers the pleadings as set out in the Original or Amended NOCC.

Should the CPL be cancelled under ss. 256 and 257 of the LTA?

- [40] In the alternative, Lumina seeks to have the CPL cancelled under ss. 256 and 257 of the LTA, alleging that it is experiencing hardship and inconvenience as a result of its registration.

[41] Sections 256 and 257 of the LTA provide in material part as follows:

256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
 - (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
- (2) The form of the undertaking must be settled by the registrar of the court.
- (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

[42] Lumina submits that due to the registration of the CPL it is unable to subdivide the Property, and that as a result it has or is likely to experience hardship and inconvenience. Its position is that the money payable under the Second Contract is only payable upon the subdivision occurring. It argues that it is in Mr. Qaddoura's interests to allow the subdivision to go through, and that all of his remedies would remain intact. Relying on its arguments considered above, it submits that Mr. Qaddoura's claim for an interest in land is without

merit, with the result that the CPL should be discharged, and security be limited to an undertaking to damages or a nominal amount.

- [43] Mr. Qaddoura submits that the CPL ought to be maintained, and in the alternative, if I find hardship, that sufficient security, in the amount of \$460,000, be required to be posted.
- [44] In support of its position that it is suffering hardship because it is unable to subdivide the Lands, Lumina points to a letter from the City of Surrey to Lumina, dated March 31, 2020, attaching a Habitat Restoration Agreement relating to the Lands.
- [45] Lumina also relies on an email from its solicitor who is handling the subdivision application, to Mr. Haleem and counsel for Lumina, dated May 7, 2020. It states that "we are ready to proceed with the subdivision application once the CPL is dealt with. The drafts of the subdivision documents are done, but will have to be updated and then signed by the various owners and their lender".
- [46] Mr. Qaddoura argues that the evidence relied upon by Lumina is insufficient to establish hardship. He submits that there should have been affidavit evidence about the contracts being premised on subdivision occurring, and that the Second Contract ought to have had an express term that money would only be payable on subdivision. He relies upon a status report from the City of Surrey, dated May 8, 2020, which indicates there a number of outstanding items that must be addressed in order for the Property to be subdivided, and does not include the removal of the CPL.
- [47] In *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141, the Court of Appeal held that "the plain and ordinary meaning of the words of ss. 256(1) and 257(1) provide that an application to cancel a CPL under s. 256(1) must include an affidavit that sets out the particulars of the hardship and inconvenience experienced": at para. 26. Further, "evidence of hardship must be more than general allegations of inconvenience but include particulars that demonstrate real hardship": at para. 37.
- [48] The burden is on Lumina to establish hardship and inconvenience. The evidence submitted by Lumina to establish hardship is limited. Little weight can be attached to an email from one lawyer for Lumina to another lawyer for Lumina and its principal Mr. Haleem stating that they are ready to proceed with the subdivision once the CPL is dealt with. Neither of the two documents from the City of Surrey say anything about the effect of the CPL on the subdivision. Direct evidence from either Mr. Haleem or a representative of the City of Surrey saying that the CPL is preventing the subdivision from occurring would have greatly assisted Lumina in this application.
- [49] The leading decision considering ss. 256 and 257 of the LTA is the decision of the Court of Appeal in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388. At para. 28 the court makes clear that "as a preliminary matter the applicant must show that it is experiencing or likely to experience 'hardship and inconvenience' as a result of the registration of the CPL." The court held that earlier decisions that had suggested that

hardship that is "insignificant", "not significant" or "trifling" was sufficient were incorrect. At the same time, a court should not be "exacting" in its analysis of hardship and inconvenience.

- [50] On my review of the evidence, I do not think there is any real room for doubt that the parties entered into the contracts in furtherance of Lumina's plan to subdivide the Property. The references in the contracts to "Half of Lot No. 4" as the Lands being purchased and sold only make sense if the ultimate plan was to subdivide the Property so that there would be lots. It is also likely that the CPL is standing in the way of that plan being executed, and thereby standing in the way of Lumina's ability to deal freely with the Property: *Watson Island Development Corp. v. Prince Rupert (City)*, 2015 BCSC 1474 at para. 40.
- [51] The contracts do not, however, on their face, contain any suggestion that Lumina would only be obligated to pay Mr. Qaddoura on the subdivision occurring. Further, in his March 1, 2019 email to Mr. Qaddoura, Mr. Haleem wrote that "[a]s I said earlier, YES, your payment was due Dec 31, 2018 and we could not arrange that payment ". Lumina may, at trial, be able to establish that it was not obliged to pay Mr. Qaddoura until the subdivision occurred, but the Second Contract does not, as acknowledged by counsel for Lumina in submissions before me, say that.
- [52] Taking into account the Court of Appeal's statement in *Youyi* that the court should not be "exacting" in its analysis of hardship and inconvenience, I conclude that Lumina has met its burden of establishing hardship and inconvenience caused by the registration of the CPL. I come to this conclusion on the basis that it is reasonable to infer that the CPL is standing in the way of the subdivision proceeding as contemplated by the parties.
- [53] I must now turn to the options available to the court under s. 257 of the LTA. The remedies available under ss. 257(1)(a) and (b) are discretionary, with that discretion being constrained by the statutory requirements set out therein: *Watson Island*, paras. 41-42.
- [54] Under s. 257(1)(a), I may only cancel the CPL if I am satisfied that "damages will provide adequate relief to the party in whose name the [CPL] has been registered."
- [55] In the Amended NOCC, Mr. Qaddoura seeks specific performance of both contracts. I take this to mean, in effect, that he seeks specific performance of both contracts in turn, i.e. that he be registered as an owner of an undivided interest in the Lands under the First Contract and then be paid the monies owing under the Second Contract, upon which his interest would be transferred back to Lumina.
- [56] There is no real dispute between the parties that Mr. Qaddoura will ultimately be entitled to the full purchase price set out in the Second Contract, their only difference being as to when that amount was or will be payable. Ultimately, damages would provide an adequate remedy for Mr. Qaddoura. It is therefore appropriate to cancel the CPL: *0624708 B.C. Ltd. v. Wallace*, 2011 BCSC 1383, paras. 23-24.

- [57] I must therefore determine the amount of security to order. Lumina argued that an undertaking as to damages or nominal security would be sufficient, while Mr. Qaddoura argued that security in the amount of the full purchase price, \$460,000, was appropriate.
- [58] Pursuant to s. 257(3), I must take into account the probability of the party's success in the action in respect to which the CPL is registered. While the defendant need not in every case post security equal to the estimated damages, the potential for substantial damages is a factor to be taken into account, as is the financial worth of the party being required to post security: 0624708, *supra*, at para. 25.
- [59] In my view, Mr. Qaddoura is likely to succeed in this action. There is no doubt that he is or will be entitled to receive \$460,000 from Lumina, the only question being when. On the face of the Second Contract, it was due on December 31, 2018. While it is possible that Lumina will overcome the language of the Second Contract on a full evidentiary record at trial, it does not, on the evidence before me, appear likely.
- [60] In terms of Lumina's ability to pay security, Mr. Qaddoura submitted evidence showing the Property as a whole had an assessed value as of \$3,882,000 as of July 1, 2019. As of July 25, 2019, there was a first mortgage registered against the Property in the amount of \$870,000, and second mortgage registered against the Property in the amount of \$650,000. Counsel for Mr. Qaddoura submitted that there is substantial equity in the property, by my calculation based on those figures in the neighbourhood of \$2,362,000. Given that Lumina has an undivided one-quarter interest in the property, it should have access to one quarter of that equity, which would be \$590,000.
- [61] Counsel for Lumina did not submit that Lumina would be unable to post substantial security, merely that it should not be required to as the claim is, in his submission, weak. I have already rejected that proposition.
- [62] In my view, this is an appropriate case in which to order security. Given the strength of Mr. Qaddoura's claim, and the apparent financial ability of Lumina to pay security, I consider an order for security in the amount of \$460,000 to be appropriate. If Mr. Qaddoura succeeds in his action, he may well be entitled to damages in excess of that amount for damages suffered due to Lumina's delay in paying the monies owing under the Second Contract.
- [63] I therefore order that the CPL be cancelled upon Lumina posting security of \$460,000.

Conclusion

- [64] The Original NOCC filed by Mr. Qaddoura claimed an interest in land. I have dismissed the parts of Lumina's application seeking to cancel the CPL under s. 251 of the LTA. I have also dismissed the parts of Lumina's application seeking to have parts of the NOCC (whether the Original or the Amended version) struck under Rule 9-5 or dismissed under Rule 9-6.

[65] I found that Lumina has, however, established hardship and inconvenience as a result of the CPL. Given the strength of Mr. Qaddoura's claim, and the value of the Property, I ordered that the CPL be cancelled upon Lumina posting security of \$460,000.

[66] Costs of the application will be in the cause.

"Lyster J."

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